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Wan Mazuki bin Wan Abdullah v Public Prosecutor

B FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–56 OF 2008(T)
RICHARD MALANJUM CJ (SABAH AND SARAWAK), AUGUSTINE PAUL AND JAMES FOONG FCJJ
27 MAY 2010

C

Criminal Procedure — Prosecution — Opening statement — Whether prosecution's opening statement at trial could not shackle it from adducing new evidence which might be relevant and necessary in interests of justice — Whether opening statement merely guide to court and parties of evidence likely to be adduced D *to prove or rebut a charge, claim or defence — Whether it was question of fact in each case whether actual delivery or sale of dangerous drugs had taken place — Whether just because agreed price for drugs was not paid when they were delivered did not mean no sale had taken place*

E

The appellant ('accused') was convicted and sentenced to death by the High Court for trafficking in 3,224.47g of cannabis. His conviction and sentence was upheld by the Court of Appeal ('COA'). The prosecution's evidence was that a police informer (PW8) had arranged a meeting between the accused and F a police officer who posed as a buyer for drugs (PW5) and in that meeting the accused agreed to deliver 5kg of cannabis to PW5 two days later in exchange for RM45,000. On the appointed day, the accused arrived at a petrol station carrying a bag to meet PW5 unaware that he was being watched by a police party lying in ambush. When the accused was about to take out the cannabis G from the bag to show it to PW5, the latter signaled the police party to move in and arrest the accused. In his defence, the accused contended that the prosecution did not prove that he had actually delivered the cannabis to PW5 or that a 'sale' had taken place since no money was exchanged. The accused claimed that the reason he went to the petrol station was to meet PW8 to H collect a repayment on a loan. The trial judge did not believe the accused's defence and found that he had not cast a reasonable doubt in the prosecution's case which had been proved beyond reasonable doubt. In affirming the conviction, the COA ruled that whether or not 'actual delivery' of the drug had taken place was a question of fact and that in the instant case, the acts of the I accused in bringing the drugs to the petrol station and placing it near PW5 was sufficient to constitute delivery. The instant appeal was against the COA's decision.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) The non-payment of the agreed price in the present case did not mean there was no actual delivery of the cannabis on the appointed day. There was a concurrent finding of fact by the courts below that there was actual delivery of the cannabis by the accused to PW5 (see paras 17 & 20).

(2) The accused's contention that there was no actual delivery of the drugs in question and no completed sale had no merit and it ran counter to his original version that he went to the petrol station to collect payment from PW8 for money owing. If that version was true, then the question of negotiation and sale of the drug should not arise as it was irrelevant to his defence. In submitting as he did, the accused not only inadvertently gave credence to the testimonies of PW5 and PW8 but probably strengthened them as well. Also, if there was any truth to the accused's claim that his meeting with PW5 and PW8 two days earlier was for the purpose of demanding payment from PW8 for money owed, then there was no reason for him to have met up with PW5 at the petrol station. There was also no evidence to show PW5 had framed the accused with the drugs (see paras 21–23).

(3) The discrepancies between PW5's oral testimony and his police report with regard to the number of packets of cannabis that were found in the bag were not material such as to render unsafe the finding of fact by the trial judge. On the contrary, they indicated truthfulness in PW5's evidence (see paras 25–27).

(4) The contents of the opening statement of the prosecution at the trial could not be taken as conclusive so as to disallow any further evidence to be adduced irrespective of it being fresh or consequential. An opening statement in any trial should be taken as merely a guide to the court and the parties of the evidence likely to be adduced to prove or rebut a charge, claim or defence. An opening statement should not be allowed to lock out any fresh or clarifying evidence which might be relevant and necessary in the interests of justice (see para 31).

(5) The trial judge had analysed all the evidence adduced by both the prosecution and the defence with the benefit of audio-visual advantage and came to the finding that the accused's version was not believable, labelling it as one of recent invention, and that the prosecution had established its case against the accused beyond reasonable doubt. The findings of facts by the trial judge had to be given due weight and deference. An appellate court should be slow to interfere with such findings. At any rate, there were no findings of facts that were perverse or obviously unsupported by the evidence adduced or that no reasonable trier of facts would have come to the conclusions that were made in this case (see paras 20 & 33–34).

[Bahasa Malaysia summary

Perayu ('tertuduh') disabitkan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi kerana mengedar dadah kanabis sebanyak 3,224.47g. Sabitan dan hukuman disahkan oleh Mahkamah Rayuan ('MR'). Keterangan pihak pendakwaan adalah bahawa pemberi maklumat polis (PW8) telah mangatur perjumpaan di antara tertuduh dan pegawai polis yang menyamar sebagai pembeli dadah (PW5) dan dalam perjumpaan tersebut tertuduh bersetuju untuk menghantar 5kg kanabis kepada PW5 dua hari kemudiannya dengan pertukaran untuk RM45,000. Pada hari yang dijanjikan, tertuduh tiba di stesyen minyak memegang beg untuk berjumpa dengan PW5 tanpa disedari yang dia diperhatikan oleh sepasukan polis yang menunggu untuk menyerbu. Apabila tertuduh hendak mengeluarkan kanabis daripada beg untuk menunjukkannya kepada PW5, PW5 memberi isyarat kepada pasukan polis tersebut untuk bergerak dan menangkap tertuduh. Dalam pembelaannya tertuduh berhujah bahawa pihak pendakwaan tidak membuktikan yang dia sebenarnya menghantar kanabis tersebut kepada PW5 atau bahawa 'sale' telah mengambil tempat memandangkan tiada pertukaran wang. Tertuduh mendakwa bahawa sebab dia pergi ke stesyen minyak tersebut adalah untuk berjumpa dengan PW8 untuk mengutip pembayaran balik pinjaman. Hakim perbicaraan tidak mempercayai pembelaan tertuduh dan mendapati bahawa dia tidak melemparkan keraguan munasabah dalam kes pendakwaan yang mana telah dibuktikan melampaui keraguan munasabah. Dalam mengesahkan sabitan tersebut, MR memerintahkan bahawa sama ada atau tidak 'actual delivery' dadah tersebut telah mengambil tempat adalah soalan fakta dan dalam kes ini, tindakan tertuduh dalam membawa dadah tersebut ke stesyen minyak dan meletakkannya di sebelah PW5 adalah mencukupi untuk membentuk penghantaran. Rayuan ini adalah terhadap keputusan MR.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Harga yang dipersetujui yang tidak dibayar dalam kes ini tidak bermaksud tidak terdapat penghantaran sebenar kanabis pada hari yang dijanjikan tersebut. Terdapat dapatan fakta selaras oleh mahkamah bawahan bahawa terdapat penghantaran sebenar kanabis oleh tertuduh kepada PW5 (lihat perenggan 17 & 20).

(2) Hujahan tertuduh bahawa tidak terdapat penghantaran sebenar dadah yang dipersoalkan dan tiada jualan yang selesai tidak bermerit dan ia bertentangan kepada versi asalnya yang dia ke stesyen minyak untuk mengutip bayaran daripada PW8 untuk wang yang dipinjam. Jika versi tersebut adalah benar, dengan itu soalan rundingan dan jualan dadah tidak patut berbangkit kerana ia tidak relevan kepada pembelaannya. Dalam menghujahkan seperti yang dibuatnya, tertuduh bukan sahaja secara tidak sengaja membuktikan kebenaran kepada keterangan PW5 dan PW8 tetapi kemungkinan menguatkannya juga. Juga, sekiranya

terdapat apa-apa kebenaran kepada dakwaan tertuduh bahawa perjumpaannya dengan PW5 dan PW8 dua hari sebelumnya untuk tujuan meminta bayaran wang yang dihutang oleh PW8, oleh itu tidak terdapat alasan untuk dirinya berjuma dengan PW5 di stesyen minyak tersebut. Juga tidak terdapat keterangan untuk menunjukkan PW5 telah menganiayai tertuduh dengan dadah tersebut (lihat perenggan 21–23).

(3) Percanggahan di antara keterangan lisan PW5 dan laporan polisnya berkaitan kepada berapa paket kanabis yang dijumpai dalam beg adalah tidak material seperti untuk menyebabkan dapatan fakta oleh hakim perbicaraan tidak selamat. Sebaliknya, ia menunjukkan kebenaran keterangan PW5 (lihat perenggan 25–27).

(4) Isi kandungan penyataan pembukaan pihak pendakwaan di perbicaraan tidak boleh diambil sebagai konklusif seperti tidak membenarkan apa-apa keterangan selanjutnya untuk dikemukakan tanpa mengira ianya baru atau berbangkit. Penyataan pembukaan dalam mana-mana perbicaraan patut diambilkira hanya sebagai panduan kepada mahkamah dan pihak-pihak keterangan mungkin dikemukakan untuk membuktikan atau mematahkan tuduhan, tuntutan atau pembelaan. Penyataan pembukaan tidak patut dibenarkan untuk tidak membenarkan apa-apa keterangan baru atau jelas yang mungkin relevan dan perlu dalam kepentingan keadilan (lihat perenggan 31).

(5) Hakim perbicaraan telah menganalisa kesemua keterangan yang dikemukakan oleh kedua-dua pihak pendakwaan dan pembelaan dengan faedah kelebihan audio-visual dan mencapai dapatan bahawa versi tertuduh tidak boleh dipercayai, melabelkannya sebagai salah satu rekaan baru, dan bahawa pihak pendakwaan telah membuktikan kesnya terhadap tertuduh melampaui keraguan munasabah. Dapatan fakta oleh hakim perbicaraan perlu diambil kira dan dihormati. Mahkamah rayuan patut perlahan untuk campur tangan dengan dapatan sedemikian. Apa sahaja yang berlaku, tidak terdapat dapatan fakta ia adalah membantah atau jelas tidak disokong oleh keterangan yang dikemukakan atau tiada pembicara fakta yang munasabah akan mencapai kesimpulan yang dibuat dalam kes ini (lihat perenggan 20 & 33–34).]

Notes

For cases on prosecution, see 5(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3602–3740.

Cases referred to

Gunalan a/l Ramachandran & Ors v PP [2006] 2 MLJ 197, FC (refd)
Herchun Singh & Ors v PP [1969] 2 MLJ 209, FC (refd)
Lai Kim Hon & Ors v PP [1981] 1 MLJ 84, FC (refd)
Lim Kheak Teong v PP [1985] 1 ML J 38, FC (refd)

A *PP v Sa'ari bin Jusoh* [2007] 2 MLJ 409; [2007] 2 CLJ 197, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 78
Dangerous Drugs Act 1952 ss 2, 39B(2)

B

Appeal from: Criminal Appeal No T-05–47 of 2003 (Court of Appeal, Putrajaya)

Sukri bin Hj Mohamed (Wan Haron Sukri & Nordin) for the appellant
C *Saiful Edris bin Hj Zainuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent*

Richard Malanjum CJ (Sabah and Sarawak) (delivering judgment of the court):

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[1] The appellant was convicted and sentenced to death by the High Court on a charge under s 39B(2)of the Dangerous Drugs Act 1952 ('the Act'). His appeal to the Court of Appeal was dismissed. He now appeals to this court.

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[2] The facts have been lucidly and concisely set out by the Court of Appeal in its judgment: [2008] MLJU 285; [2008] 4 CLJ 631. Thus, in this judgment we need only to highlight those critical aspects of the facts.

F **[3]** The prosecution's case is that PW5 (Detective Corporal Mahmood bin Noor) met the appellant on 19 December 1999. The meeting was arranged by PW8 (Mohd Nasrul Alimi bin Mohamad) an informer. The purpose of the meeting was in relation to sale and purchase of cannabis, a proscribed drug under the Act.

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[4] It was the evidence of PW5 that the appellant agreed to make available 5kg of cannabis at the agreed price of RM900 per kg and that the transaction would be completed on 21 December 1999.

H **[5]** Thus, the prosecution led evidence that on the appointed date PW5 was at the petrol station at Bukit Jong, Kuala Terengganu. Soon after the appellant arrived carrying with him a blue bag (exh P11). He met PW5. From inside the bag the appellant took out a pink coloured bag (exh P10) to show to PW5.

I **[6]** According to PW5 he could smell cannabis. Thereafter he requested the appellant to put back exh P10 into exh P11. The appellant did so and placed exh P11 on the cement floor near PW5. The agreed signal was then given by PW5 to the police party who were by prior arrangement waiting in ambush nearby.

[7] Subsequently the appellant was arrested. Investigation proceeded with the contents of exh PIO sent to the Chemistry Department for analysis. From the chemical analysis it was found that exh PIO contained 3224.47g of cannabis.

[8] After hearing the evidence led by the prosecution the learned trial judge ruled that there was prima facie case for the appellant to answer and called upon him to enter his defence.

[9] In his defence the appellant denied delivering the drug. He explained that PW8 owed him money and he was at the place to collect the repayment.

[10] At the conclusion of the trial the learned trial judge held that the version of the appellant did not cast any reasonable doubt on the prosecution's case and that the prosecution had established its case beyond reasonable doubt against the appellant.

[11] Before the Court of Appeal learned counsel for the appellant raised two main issues, namely, (i) that the acts of the appellant did not amount to sale of the drug in question as there was no actual delivery of the substance; and (ii) that the learned trial judge erred in evaluating the version of the appellant. The Court of Appeal rejected both contentions and proceeded to dismiss the appellant's appeal.

[12] In respect of issue (i) the Court of Appeal gave a concise but illuminating reason for rejecting it. It held thus, (per Gopal Sri Ram JCA):

> In our judgment whether there is actual delivery is a question of fact and of degree. It depends on the particular facts of an individual case. Varying fact patterns may be envisaged. An accused (as vendor) may physically hand the drug to the buyer (usually an agent provocateur). Or he may place it near the buyer. Or he may make it readily available for the buyer to take control of it as happened in *Sa'ari Jusoh*. Or he may place it in a vehicle or a room and hand the keys to the same to the buyer. In all these cases there is actual delivery. There may be cases where delivery is constituted by more than one act. Take this very case. The acts of the appellant in bringing the drug to the petrol station and placing it near PW5 when taken cumulatively constitute actual delivery.

[13] As regards issue (ii) the Court of Appeal held:

> There is clear authority for the proposition that in an appeal of this nature which turns on questions of fact particularly in relation to issues of credibility, this court will be reluctant to interfere with the findings made by the primary trier of fact. We need go no further than to quote the following passage from the judgment of Shaik Daud JCA in *Andy Bagindah v PP* [2000] 3 CLJ 289:

There is no dearth of authorities to say that in every case, there are bound to be contradictions and discrepancies. The question to be decided by the trial judge is whether those contradictions and/or discrepancies are material ones so as to strike at the very root of the charge. It is for the trial judge to consider this since he was the one who saw and heard the evidence. In the present case the learned judge concluded that there were discrepancies but those discrepancies were not material ones. Since this involved the credibility of witnesses, we held that the learned judge was a better person to decide and an appellate court ought not to interfere with such findings.

[14] Before us learned counsel for the appellant raised substantially the same points as submitted before the Court of Appeal.

[15] On the first point he argued that negotiation did not constitute a sale of the proscribed drug. Further, in this case there was no actual delivery as understood in law. He cited the case of *Public Prosecutor v Sa'ari bin Jusoh* [2007] 2 MLJ 409; [2007] 2 CLJ 197.

[16] In *Sa'ari bin Jusoh*'s case on the issue of delivery under s 2 of the Act this court said:

Per Augustine Paul FCJ:

> Applying the approach of strict construction, we note that section 2 of the Act does not employ the expressions 'agreement to sell' or 'agreement to buy' to fall within the definition of trafficking. Accordingly, in our judgment, a mere agreement to buy or sell a proscribed drug is not an act of trafficking within section 39B(1)(a) of the Act. Neither, we may add, do negotiations for a sale amount to the offence of trafficking within section 39B(1)(a). Whether they are caught by other provisions of the Act is a matter that must await decision in some future case.
>
> On the facts of the present case, it is our judgment, that *to constitute the act of 'selling' within section 2 of the Act, there must have been an actual delivery of the drugs bv the appellant accompanied bv the physical handing over of the agreed price by the agent provocateur in exchange. In other words, the transaction must have been completed.* Anything short of this is insufficient on the instant facts as it would admit a more lenient; a more flexible; approach to the construction of a penal statute. And that, on the authorities already discussed, is impermissible. Needless to say such a completed transaction did not take place in the present instance because the trap was sprung too early. (Emphasis added).
>
> *A sale is therefore complete upon transfer of the property in the goods even though the price has not been paid.* A sale in this sense cannot therefore be described as an act preparatory to the sale or as negotiations leading to the sale or even as an agreement for a sale. (Emphasis added).

Per Abdul Aziz FCJ:

> 'For my part, in considering the dictionary meaning of 'sell' for the purpose of determining the ordinary meaning of 'selling' in the definition of 'trafficking', I would reject Webster's meaning No 2, without having to resort to the existence of paras (b) and (c) of s 39B(1), as one that could not have been intended by the legislature. The meaning intended is meaning No 1, which for the present case is 'to ... deliver... goods... for money'. *So long as the delivery is for money — which the delivery in this case was — as opposed to delivery as a gift or on some other basis, it is selling even though the money for which the goods are delivered has not passed to the seller.* (Emphasis added).

[17] On cursory reading of the separate judgments given in *Sa'ari Jusoh*'s case one would get the impression that there was a divergence in opinion on the issue of delivery and the payment of the agreed price. However, on careful analysis both the judgments held the view that to constitute actual delivery it would not be necessary for the agreed price to be paid upon physical delivery of the drug itself. Thus, in the present case the non-payment of the agreed price should not mean that there was no actual delivery of the drug on the appointed day.

[18] On the issue of 'actual delivery' the Court of Appeal in this present case said:

> In our judgment *whether there is actual delivery is a question of fact and of degree. It depends on the particular facts of an individual case*. Varying fact patterns may be envisaged. An accused (as vendor) may physically hand the drug to the buyer (usually an agent provocateur). Or he may place it near the buyer. Or he may make it readily available for the buyer to take control of it as happened in *Sa'ari Jusoh*. Or he may place it in a vehicle or a room and hand the keys to the same to the buyer. In all these cases there is actual delivery. There may be cases where delivery is constituted by more than one act. Take this very case. The acts of the appellant in bringing the drug to the petrol station and placing it near PW5 when taken cumulatively constitute actual delivery. (Emphasis added).

[19] We are entirely in agreement with the view expressed by the Court of Appeal on what constitutes 'actual delivery' thus elucidating the issue as earlier propounded in *Sa'ari bin Jusoh*'s case.

[20] And we observe in this instant case that there was a concurrent finding of fact by both the courts below on the actual delivery of the drug by the appellant to PW5. In particular, the learned trial judge who had the advantage of audio-visual of all the witnesses during their testimonies, including the appellant, did not believe the version of the appellant and held that it did not cast any reasonable doubt on prosecution's case. As such being the final appellate court we should be slow in interfering with such finding of fact (see *Herchun Singh & Ors v Public Prosecutor* [1969] 2 MLJ 209; *Lim Kheak Teong*

A *v Public Prosecutor* [1985] 1 ML J 38). At any rate we do not find such finding of fact perverse or obviously unsupported by the evidence adduced or that no reasonable trier of facts would have come to such conclusion.

B **[21]** In his evidence on oath the appellant testified that he met PW5 and PW8 on 19 December 1999 to demand payment from PW8 for money owed. If indeed there was any truth in the assertion there was no reason for him to deal with PW5 during the meeting at the petrol station on the evening of 21 December 1999. Further, there was not an iota of evidence adduced to indicate that PW5 framed the appellant with the drug found inside the bag (exh P11).

C

[22] We would add that in submitting for the appellant that there was no actual delivery and thus no completed sale of the drug, it ran counter to the original version of the appellant that he went to the petrol station hoping to collect payment from PW8 for money owing. Moreover, if indeed there was any truth in the appellant's version the question of negotiation and sale of drug should not arise. It would have been quite irrelevant to his defence. Thus, in submitting as he did learned counsel for the appellant had not only inadvertently rendered credence to the testimonies of PW5 and PW8 but had probably strengthened them as well.

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[23] For the foregoing reasons we therefore find no merit in the contention that there was incomplete sale and that there was no actual delivery of the drug in issue.

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[24] Next, learned counsel for the appellant submitted that there was no or inadequate consideration of certain material evidence adduced in this case by the learned trial judge. He made reference to at least five items, namely, the police report, the opening statement of the prosecution, the search list, the contradictions in the oral testimony of PW5 and his police report and the unexplained missing material witness by the name of Mokzani Mohamad.

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[25] As regards the police report (exh P34) and the oral testimony of PW5 it was highlighted that PW5 gave contradictory account on the number of packets found inside the bag (exh P11).

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[26] Learned counsel contended that in his oral evidence PW5 said that there were three big packets and one small packet found inside the bag while under cross-examination he agreed that there were three big packets and two small packets consonant with what was reported in the police report. These discrepancies according to learned counsel were not considered or adequately taken into account by the courts below before coming to their respective decisions.

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[27] With respect, we do not think such discrepancies are material as to render unsafe the finding of fact by the learned trial judge. On the contrary they indicate truthfulness in the evidence of the witness PW5. In *Lai Kim Hon & Ors v Public Prosecutor* [1981] 1 MLJ 84 at p 93 Abdul Hamid FJ (as he then was) said this:

> Viewed as a whole it seems clear that the finding of fact made by the trial judge turned solely on the credibility of the witnesses. The trial judge heard the testimony of each witness and had seen him. He also had the opportunity to observe the demeanour of the witnesses. Discrepancies will always be found in the evidence of a witness but what a judge has to determine is whether they are minor or material discrepancies. And which evidence is to be believed or disbelieved is again a matter to be determined by the trial judge based on the credibility of each witness. In the final analysis it is for the trial judge to determine which part of the evidence of a witness he is to accept and which to reject. Viewed in that light we did not consider it proper for this court to substitute its findings for that of the learned trial judge.

See also *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2006] 2 MLJ 197.

[28] Learned counsel also submitted that the before coming to his findings the learned trial judge failed to consider adequately the contents of the opening statement of the learned deputy public prosecutor. He further complained that the Search list adduced did not state where the drug was found.

[29] In response the learned deputy argued that the complaint raised was not included in the petition of appeal and that this court should not consider it at all.

[30] Notwithstanding that the issue was not included in the petition of appeal we took the liberty to consider it. And having done so we find the complaint to be without any substance.

[31] The contents of the opening statement of the learned deputy should not be taken as conclusive so as to disallow any further evidence to be adduced irrespective of it being fresh or consequential. We would further say that an opening statement in any trial should be taken as merely a guide to the court and the parties before it of the evidence likely to be adduced in order to prove or rebut a charge, claim or defence thereof. Indeed, an opening statement should not be allowed to lock out any fresh or clarifying evidence which may be relevant and necessary in the interest of justice.

[32] As for the Search list we are of the view that the omission is minor and one which could be and was in fact clarified in court by the relevant witnesses called. There is no reason why the omission should be considered fatal as to

A render the evidence of the relevant witnesses otiose.

[33] In any event the learned trial judge did analyze the evidence adduced including the oral testimonies of the witnesses called by the prosecution and the appellant. He came to his findings with the advantage of having the
B audio-visual of the witnesses called. Thus, as we have said earlier on in this judgment the finding of fact by the learned trial judge should be given due weight and deference.

C **[34]** And in the final analysis having the benefit of the evidence adduced as a whole the learned trial judge did not believe the version of the appellant labeling it as one of recent invention and came to the conclusion that the prosecution had established its case beyond reasonable doubt against the appellant.

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[35] The other issue raised by learned counsel was the failure by the prosecution to call a person alleged to have been present during the negotiation for the sale and purchase of the drug. According to learned counsel such fact was not even disclosed by the prosecution.

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[36] In reply the learned deputy highlighted the evidence of PW5 and PW8. They testified that during the first meeting on 19 December 1999 there were four persons present. The appellant was with his friend who was unknown to
F them. The appellant on the other hand testified that there were five persons present.

[37] Irrespective of the number of persons present during that first meeting we would have thought that at least the appellant should have called his friend
G present at the meeting as a witness to support his version instead of blaming the prosecution which did not know that person. As such there was no question of suppression of a witness as contended by learned counsel for the appellant.

[38] We have also considered the other issues raised by learned counsel for
H the appellant not specifically dealt with in this judgment. Even if we are with the appellant on those issues we find them of little consequence to our final decision.

[39] Accordingly and having considered the arguments marshaled before us
I and for the reasons given above we hereby dismiss this appeal. The conviction found and sentence imposed upon the appellant by the courts below are hereby affirmed.

[40] Finally, we are very much conscious of the delay in coming up with this

judgment. However it is not without reason. On completion of hearing of this appeal before a panel of three judges our learned brother the late Augustine Paul FCJ was assigned to write the judgment. Unfortunately he fell ill at intervals. We were hopeful that he would recover and complete the task. Unfortunately it did not happen. He passed away peacefully. We, the remaining members of the coram thus assumed the responsibility of writing this judgment. We are entitled to proceed to consider and decide this appeal pursuant to s 78 of the Courts of Judicature Act 1964. As our decision is unanimous de novo hearing is therefore unnecessary.

Appeal dismissed; conviction and sentence affirmed.

Reported by Ashok Kumar